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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]54

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JAMES H. McKENNEY,
(Clerk)

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,

Bankrupt.

MARTIN CONBOY, Trustee,

Appellant,

versus

FIRST NATIONAL BANK OF JERSEY CITY,

Claimant-Appellee.

BRIEF FOR APPELLEE.

WILLIAM G. WILSON,

Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

United States Supreme Court.

In the Matter

of

Phillip Semmer Glass Company, Limited,
Bankrupt.

Martin Conboy, Trustee,
Appellant,

vs.

First National Bank of Jersey City,
Respondent.

BRIEF FOR APPELLEE.

This is an appeal (27) from an order or decree of the Circuit Court of Appeals for the Second Circuit (21) affirming a decree of the District Court of the United States for the Southern District of New York confirming the report of a Referee in Bankruptcy, dated May 7, 1904, (2-5) allowing the claim of the First National Bank of Jersey City against the above named bankrupt at the sum of $8,519.27, and also from an order of said Circuit Court of Appeals (24) denying a motion of the appellant for a rehearing.

The decree of affirmance was made and entered January 23, 1905 (21).

The petition for rehearing was filed May 8, 1905; and the order denying same was made and entered May 24, 1905 (24).

Statement.

At the time when the petition in bankruptcy was filed against the Philip Semmer Glass Co., Limited, March 18, 1903, (29) that company, a dealer with the First National Bank of Jersey City, had on deposit with the Bank a balance to its credit of $6232.96. On the same day the Bank held unmatured promissory notes made in favor of the bankrupt Company which the Bank had, upon the endorsement of the Company, discounted for account of the Company, and upon these the Company had received from the Bank a sum largely in excess of this balance. This balance was applied by the Bank to the payment of these notes, so far as it would go, and the Bank filed its claim in bankruptcy against the bankrupt Company for the remainder of these notes, amounting, with interest and protest fees, to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy, and payment of each was duly demanded and refused, and notice of protest given to the bankrupt Company as endorser (30-31). A list of the notes is giving in the findings (30).

The Trustee moved to expunge the claim of the Bank on the ground that it was not within the right of the Bank to set off the deposit in its hands against the bankrupt Company upon its endorsements, and that, should it be permitted to do so, the result would be an unlawful transfer and a preference to the Bank to the extent of the deposit over the bankrupt's other creditors of the same class. This motion was denied and an appropriate order was entered (31). And it is this order which was successively reviewed and affirmed in the District Court and in the Circuit Court of Appeals, and the latter court has found the following Conclusions of Law (31) which this Court is now asked to review:

"1. That the claim of the First National Bank of Jersey City on account of the unmatured notes endorsed by the bankrupt and held by said bank and the claim of the bankrupt against the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the said bank was entitled to set off one against the other.

"II. That the allowance of said set off is not an unlawful preference within the true intent and meaning of the Bankrupt Law."

The findings of the Circuit Court of Appeals were made to be included in the record on this appeal "*nunc pro tunc*" as though the same were made and filed at the time of the entry of the judgment of this Court on the 23rd day of January, 1905 (29).

POINT FIRST. The appeal was not taken within the time limited by the General Orders.

The decree from which the appeal is taken was entered January 23, 1905 (21).

The petition of appeal was dated May 24, 1905, and allowed May 27, 1905 (28).

The only authority for this appeal is found in the following provisions:—

Bankrupt Law, Section 25:—

"*b.* From any final decision of a court of appeals, *allowing or rejecting a claim* under this act, an appeal may be had under such rules and *within such time* as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

* * * * * * * *

"2. Where some Justice of the Supreme Court shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

General Orders in Bankruptcy, XXXVI.:—

"2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals * * * shall be taken *within thirty days after the judgment or decree*, and shall be allowed by a judge of the court appealed from or by a Justice of the Supreme Court of the United States."

It is obvious that the present appeal was taken *four months* "after the judgment or decree" appealed from, and therefore was not taken within the time limited.

The limitation of time fixed by the General Orders under the authority and direction of the Bankrupt Law has the same effect as if the time had been fixed in the first instance by the statute itself. The purpose of this limitation of thirty days is apparent. It is intended to compel prompt action and to prevent the tying up of bankrupt estates by prolonged litigation over disputed claims.

The allowance of the appeal and the certificate of the Justice of this Court cannot change the situation. The certificate merely declares that there is ground for an appeal in the nature of the questions involved. Its effect is necessarily subject, by the terms of the statute, to the provision the appeal founded upon or supported by such certificate must be taken "within such time as may be prescribed by the Supreme Court of the United States," and this Court has prescribed the time, and has limited it to thirty days. The formal allowance of the appeal is not an adjudication that the appeal is taken in time. That is a question of law to be passed upon by the Court.

The appellant seeks to save his appeal by referring the limitation to the date of the order denying his petition for a rehearing. And he has assumed to appeal from that order as well as from the judgment or decree allowing the claim.

No appeal lies from that order. *Brockett v. Brockett*, 2 How. 238. An application for a rehearing is addressed wholly to the discretion of the Court, and its purpose is only to afford the court to which it is addressed an opportunity to correct its own errors. It is designed to obviate the necessity for an appeal, and not to lay the foundation of an appeal.

The order denying the petition for rehearing is not the judgment or decree allowing the claim, but is merely the refusal of the Court to disturb the judgment or decree—allowing the claim—which it had made four months before. And it is from that judgment or decree, alone, that any appeal lies.

No reason is shown why the appeal was not taken within the thirty days after the decree. When that decree was entered the appellant had his option to take an appeal to this Court within the time limited, or to petition the Circuit Court of Appeals for a rehearing. Indeed, if he had acted promptly, as the time limitation was intended to compel him to do, he might have made his application for a rehearing and have had it determined within the thirty

days, and have still taken his appeal in time. And it is hardly to be supposed that the Circuit Court of Appeals, if its attention had been drawn to the situation, would not have decided the application in time to preserve his right of appeal beyond any question. If that Court had, in such case, failed to do so, a question might arise which does not exist now.

But here the appellant let the thirty days expire, and let the full period of three months expire, before he filed his petition for rehearing. The decree was entered January 23, 1905. The petition for rehearing was filed May 8, 1905. The time to appeal had expired more than two months before, on February 22, 1905. The right of appeal under the limitation of the General Orders had then been wholly lost.

The proposition that the appellant could lose his right of appeal by his own act in neglecting to take it in time, and then reinvest himself with that right by his own act in filing a petition for a rehearing does not commend itself as consonant with reason or with the principles upon which courts administer justice.

The limitation of the time to appeal is strictly analogous to the limitation upon the time for commencing an action. And, as to the latter, this Court said in *Bauserman v. Blunt*, 147 U. S. 647, 657 : "The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."

Cases are cited on behalf of the appellant which are claimed to support the conclusion that a motion for rehearing made at any time during the same term of the court in which the judgment appealed from is entered suspends the running of the period limited for taking the appeal. But this very statement of the appellant's position shows that the rule invoked has no application to the present case.

An application for rehearing cannot *suspend* the running of a period of limitation when that period has *already expired* before the application is made. To hold that it can would be a contradiction in terms, unsupported by authority, as will appear from an examination of the cases cited.

In *Brockett v. Brockett*, 2 How. 238, the leading authority, the decree was made on May 10, 1843, and the petition for rehearing was filed May 26, 1843, that is within sixteen days.

In *Aspen Co. v. Billings*, 150 U. S. 31, the decree was of Octo-

ber 20, 1890, and the petition for rehearing was filed five days later, October 25, 1890.

In *Voorhees v. Noyes Mfg. Co.*, 151 U. S. 135, the decree was made January 7, 1891, and the application for rehearing January 10, 1801, three days later.

In *Slaughter House Cases*, 10 Wall. 273, the judgments were entered April 11, 1870, and the petitions for rehearing were filed sixteen days later, on April 26, 1870.

In *Railroad Co. v. Bradleys*, 7 Wall, 575, the decree was made February 6, 1869. The motion to rescind or set aside the decree was made on March 6, 1869, twenty eight days after the entry of the decree.

In *Kingman v. Western Mfg. Co.*, 170 U. S., 675, the judgment was entered June 4, 1895, and motion for new trial was made two days thereafter, on June 6, 1895.

In *Texas & Pacific R'y Co. v. Murphy*, 111 U. S., 488, it was said: "The record does not show in express terms when the motion for a rehearing was made, but it was entertained by the Court and decided on its merits." It was therefore held that it was presumably filed in time.

In *Memphis v. Brown*, 94 U. S., 715, a judgment had been entered on March 2, 1876. A motion was made on May 20, 1876, to set it aside, and denied on the same day. The Court said: "We think that the order made by the Circuit Court, May 20, 1876, upon the motion to subject merchants' capital to the tax was such a final judgment as may be brought here for reexamination by a writ of error. The precise question decided by that order had never before been presented in the cause. The city was then for the first time required, in express terms, to subject this particular class of property to the adjudged taxation. The writ was, therefore, properly sued out upon the judgment. * * * The form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the Court had the right to do during the term for the very purpose of giving it effect for a *supersedeas*."

The language of the Court in *Sage v. Central R. R. Co.* 93 U. S. 412, 417, is directly in point. "A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all of the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the court nor

the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. * * * It would have been within the power of the Court to set aside the old decree and enter it over again, but this was refused."

The present case comes precisely within the terms of the decision last cited. The appellant, two months after his right to appeal had expired, petitioned the Circuit Court of Appeals to recall its mandate, and his petition was denied (27). That denial was, in effect, a refusal " to set aside the old decree and enter it anew."

And that court, in making its findings, carefully guarded against any other construction of its action by declaring (29) " we make the following findings of fact and conclusions of law to be included in the record on said appeal *nunc pro tunc* as though the same were made and filed at the time of the entry of the judgment of this court on the 23rd day of January, 1905."

And this was in recognition of the principle declared in the further language of the decision last cited, *Sage v. Central RR. Co.:* "The court can no more give effect to a *supersedeas* by ordering that the appeal relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years, by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, *it must appear that the delay was the act of the court,* and not of the parties."

Here the delay, continued for the whole period limited, and for two months in addition, was wholly the act of the appellant, and was incurred before the court was asked to reconsider its decision which is now sought to be reviewed.

POINT SECOND. The claim of the appellee was properly allowed.

It is not necessary to discuss the general subject of bankers' liens, for the precise question here presented is covered by the decisions in *N. Y. County Bank v. Massey,* 192 U. S., 138, *Moch v.*

Market Street National Bank, 107 Fed., 897, and *Frank v. Mercantile National Bank*, 182 N. Y., 264.

The appellant contends that as, independently of the provisions and purpose of the Bankrupt Law, set-off is ordinarily admitted only as between debts which have matured and presently payable, so the set-off provided for in the Bankrupt Law must be confined within the same limits.

Section 1 of the Bankrupt Law, defines the meaning of the word "debt," as used in the statute, thus "(11) debt shall include any debt, demand, or claim provable in bankruptcy."

Section 63 of the Bankrupt Law says: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not; * * * (4) founded upon an open account or upon a contract express or implied."

And Section 68 of the Bankrupt Law reads:

"*a.* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed and paid.

"*b.* A set off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not *provable* against the estate."

Thus, Section 63 effectively declares that the maturity or non-maturity of the bankrupt's obligation does not affect its provability as a "debt," which term under Section 1 includes "any debt demand or claim provable"; andSection 68 permits set-off in the case of mutual debts so "provable."

Now, in *N. Y. County Bank v. Massey*, 192 U. S. 138, this Court said: "Section 68*a* of the bankruptcy act of 1898 is almost a literal reproduction of Section 20 of the Act of 1867. So far as we have been able to discover the holdings were *uniform* under that act that set-off should be allowed as between a bank and a depositor becoming bankrupt." "There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

Among the decisions, under the act of 1867, are the following:—

In re Granger, 8 N. B. Reg. 30. "It clearly appearing from the proofs as well as from the allegations in the petition that these notes were negotiated to the bank by the bankrupts for a loan made to them and for their sole benefit, and that they are liable to the bank for the amounts specified in the notes, whether they are liable as endorsers or not," a petition to expunge the proof was denied.

In re Linn, 4 N. B. Reg. 46. "The 39th Section of the act provides that creditors whose debts are provable under the act may petition, and Section 19 authorizes debts not due to be proved. The 32d Section discharges the bankrupt from all debts which are provable. Literally construed, these provisions are wholly unambiguous, and authorize a creditor whose debt is not due to become a petitioner." And this was held to be the true construction of the act, upon a full discussion of the authorities and of the policy and purpose of the law, as distinguished from that of the common law which permits no action upon a debt before it becomes due.

In re City Bank, 6 N. B. Reg. 71. "The question whether a debt payable *in futuro* could be set off against a debt payable *in presenti* was one of the earliest which arose under the English bankrupt act. It was decided in the affirmative on the ground that though there might not be debts mutually payable between the parties there were mutual credits, and that the case came within the equity of the statute." "The same question has received a similar solution in the United States, under both the former and the present bankrupt acts." Upon a full discussion of the authorities, such right of set off was upheld.

Drake v. Rollo, 4 N. B. Reg. 686. A debt of the creditor, not due, was set off against a present debt of the bankrupt.

Ex parte Russell, 16 N. B. Reg. 476. Proof was allowed by Judge LOWELL of the endorsement of a note which had not matured at the date of the bankruptcy of the endorser.

In re Many, 17 N. B. Reg. 514, Judge BLATCHFORD allowed proofs on the same basis, upon notes made by the bankrupts and upon notes endorsed by them.

In *Mock vs. Market St. Nat. Bank*, 107 Fed. 897, it was said of the present act, by the Circuit Court of Appeals for the Third Circuit, as to the liability of a bankrupt endorser, whose liability did not become absolute until after the filing of the petition in bankruptcy, that such liability was clearly within the very words of the section, and that the claim upon it was provable. "The pri-

mary purpose of the bankrupt act was to relieve insolvent debtors from their pecuniary liabilities, and to secure ratable distribution of their estates among their creditors. It is not, then, to be lightly believed that congress intended to exclude from the operation and benefits of the act unmatured endorsements of commercial paper, which in every commercial community so often constitute a large proportion of the indebtedness of failing debtors. Of course, if not provable, such liabilities are not discharged. Now a construction leading to results so foreign to the general purpose of the law is not to be adopted unless plainly required by the language of the act. We cannot see that such an interpretation is demanded by anything contained in the act."

In the present case the Circuit Court of Appeals says, of the argument on behalf of the appellant, that it "entirely disregards section I subdivision 11 of the Bankruptcy Act, which provides that the word 'debt' when used in said act 'shall include any debt, demand or claim provable in bankruptcy.' That meaning must be given to the word in the set-off section. * * * To determine therefore whether the holder of a claim is entitled to the benefit of Section 68 it is necessary only to inquire whether his claim is one provable in bankruptcy. We concur with the Court of Appeals for the Third Circuit (*Moch v. Market St. Nat. Bank*, 107 F. R. 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy (20).

The uniformity of decision upon this point is recognized in *Frank v. Mercantile National Bank*, 182 N. Y. 264, 267, where it is said by CULLEN, C. J.: "The argument is that as unmatured claims against the bankrupt are provable against his estate, they necessarily are the subject of set-off under the provisions of section 68. We think that this position is well taken, but we shall refrain from entering into any discussion of the question, as the proposition seemed to be settled by decisions of the Federal Courts. The *uniform current of authority* of the District and Circuit Courts of the United States is to that effect and the law is so stated in the text books on bankruptcy. (*Re City Bank of Savings*, Fed. Cas. No. 2,742; *Ex parte Howard Nat. Bank*, Fed. Cas. No. 6,764; *Re Kalter*, 2 N. B. R. 264; *Re Little*, 6 Am. B. R. 681; *Myers v. Dickenson*, 5 Am. B. R. 595; *Union Nat. Bank v.*

McKay, 2 N. B. R. 913; *Re Phillip Semmer Glass Co.* 11 Am. B. R. 665; Collier on Bankruptcy [4th ed.], p. 498; Brandenburg on Bankruptcy, § 1131.)"

The argument for the appellant ignores the distinction between ordinary set off and that intended by the bankrupt law. The single point of difference lies precisely in this, that the bankrupt law deals with debts matured and unmatured upon the same basis, with proper adjustment of interest, in one case by the addition and in the other by the rebate of interest. In bankruptcy all debts are liquidated as of one and the same day, and every debt thus liquidated is discharged by the bankrupt's discharge.

The word "debt" is given a particular definition for the purposes of the act. It is a debt which is provable, whether matured or not. And section 68 goes so far as to direct that provable debts must be set off against debts due to the bankrupt "and *the balance only* shall be allowed or paid."

In other words, the bankrupt act makes all the debts of the bankrupt due as of the date of bankruptcy. Each creditor is entitled to a dividend, *pro rata* with the other creditors, upon the amount of his claim liquidated as of that day. And this was recognized in the report of the Referee in the present case where he says (5): "There should, however, be a deduction from the claim as filed. Under Section 63*a* there should be a deduction of interest on the several notes between the date of the filing of the petition and the maturity of the notes, respectively. * * * With this deduction the claim should be allowed."

In *Richards v. La Tourette*, 119 N. Y., 54, 59, Judge PECKHAM said referring to *Jordan v. Nat. Shoe and Leather Bank:* "Judge FOLGER in that case, said there was no foundation for the defendant's claim that it had a banker's lien on the funds of the depositor to secure the payment of a debt from the depositor not then due. It was a case, he said, which was to be decided by the statute of set off, and upon *that* statute there would be no pretense that it could be allowed. The opinion, however, distinctly recognizes the power of the Court to compel a set off *independently of any statute*, if facts for equitable interposition should be shown. None was pretended in that case. Insolvency was neither alleged nor proved."

In the case thus cited, *Jordan v. Nat. Shoe and Leather Bank*,

74 N. Y., 467, 475, it is said: "*Matthewson admr. v. Strafford Bank* (45 N. H., 108), is in accord with the position of the appellant. The opinion in that case, compares the statute of set-off of New Hampshire with that of Massachusetts, and finds them substantially alike; and citing some of the cases from the reports of the latter State, which are cited for the appellant here, declares that the right of set-off would be clear under the Massachusetts statute. But there does not seem to have been enough effect given to the fact, that of the Massachusetts cases it was said by SHAW, Ch. J., in *Bigelow v. Folger* (2 Metc., 255); that they did 'not stand upon the law regulating set-off generally, but upon the law respecting the settlement of insolvent estates.'"

And in this case of *Bigelow v. Folger*, the language of Chief Justice SHAW was as follows:

"The court are of opinion, that the defendant is entitled to set off his note against the amount due on his bond, and that it is immaterial, whether his note was due when this action was commenced, or not. This does not stand upon the law regulating set-off generally, but on the law respecting the settlement of insolvent estates. When an estate is represented insolvent, all mutual demands of every nature and kind are to be set off, and the balance only is the debt due from the estate, or to the estate, as it may be found." The note was given by plaintiff's intestate, whose estate was insolvent, and had some two years to run when the action was brought.

The decisions thus establish, beyond any question, that the subject of set-off has repeatedly been made matter of statutory regulation and control; that the statutes of Massachusetts regarding insolvency have for very many years permitted a creditor to set off the unmatured debt of the insolvent, and this in the plain interest of justice, that the creditor should not be required to pay his own debt in full and take back in return a dividend upon his claim; that, as said by the Court in *Jordan v. Nat. Shoe and Leather Bank*, which was decided upon the effect of the New York statute of set-off, "Doubtless the power to compel a set-off of debts, was exercised by equity, prior to, and independent of, any statute on the subject. But equity *follows the statute* and the law;" that the bankrupt law of 1867, to a considerable extent modeled on the insolvency law of Massachusetts, provided for set-off of debts of the bankrupt which had not matured, and was uniformly so construed; and that the present bankrupt act in "almost a literal reproduction of sec-

tion 20 of the act of 1867 " contains the same provision, and, upon every rule of reason and interpretation, should be held, and has been held, to have the same effect.

The decision of this Court in *Western Tie and Timber Co. v. Brown*, 196 U. S., 502, has absolutely no bearing upon the present case. What is said there and in the other cases upon which the appellant appears to rely, as to the underlying principles of the law of set applies only to the question as to the relations between the parties essential to the allowance of *any* set-off. That case simply held that money in possession of the creditor company, which was due from it to laborers in its employ, could not be retained by it and set-off against the bankrupt's indebtedness to the company because the laborers to whom it belonged were indebted to the bankrupt. That is, the decision was only an application of the fundamental principle that set-off is not available unless the debts and credits are *mutual*, and that a debt of C to A is not to be set off as against a debt of A to B. It has nothing to do with the proposition that debts which have not matured are the subject of proof and set-off under the terms of the bankrupt law.

And so in *Sawyer v. Hoag*, 17 Wall., 610, 622, where the Court says : " This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it," the meaning and application of this language is clearly shown by that which follows it : " The debts must be *mutual ;* must be in the same right. The case before us is not of that character."

Likewise in *Gray v. Rollo*, 18 Wall. 629, 631, the ground and point of the decision, is plainly expressed in the opinion of Mr. Justice BRADLEY, " It is clear that these claims are not mutual debts. They are *not between the same parties.* The notes exhibit a liability of the complainant and Gaylord, the policies, a claim of the complainant and his brother. * * * Nor does the case present one of mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. * * * There being neither mutual debts nor mutual credits, the case does not come within the terms of the Bankrupt Law." And, further : " We think the general rule is stated by Justice STORY in his treatise on Equity Jurisprudence, where he says : ' Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a

separate debt against a joint debt; or to state the proposition more generally, they will not allow a set-off of debts accruing in different rights.'"

Libby v. Hopkins, 104 U. S. 303, goes to the same question only, of the mutuality of the debts and credits.

In *Carr v. Hamilton*, 129 U. S. 252, 255, Justice BRADLEY, writing the opinion of the Court says: "Natural justice and equity would seem to dictate that the demands of parties mutually indebted should be set off against each other, and that the balance only should be considered as due. But the common law, for simplicity of procedure, determined otherwise, and held that each claim must be prosecuted separately. 'The natural sense of mankind,' says LORD Mansfield, 'was first shocked at this in the case of bankrupts; and it was provided for by 4 Ann., c. 17, § 11, and 5 Geo. II., c. 30, § 28.' *Green v. Farmer*, 4 Burrow, 2214, 2220, cited in 2 Story's Eq. Jur., § 1433; *S. C.*, 1 W. Bl., 651. In pursuance of these old statutes, and of the dictates of equity, the principle of set-off between mutual debts and credits has for nearly two centuries past been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute books; and *it mattered not whether the debt was due at the time of bankruptcy or not.*

If the argument upon this point appears to have been drawn out to unnecessary length, it is because of the persistance of the appellant in bringing to this Court, in the face of three successive adverse decisions below, a question which ought not to be regarded as open for present discussion. It is apparent from the foregoing authorities that the right of set-off which has been sustained herein is one which has been, for many years, firmly established.

If this be so, and if the appellant has taken advantage of his official position as trustee in bankruptcy to appeal to this Court without giving any security other than that afforded by his official bond,—and that is what he has done,—the question is fairly presented whether the case does not fall within the purview of the language of this Court in *Whitney v. Cook*, 99 U. S. 607: "Parties should not be subjected to the delay of proceedings for review in this court without reasonable

cause, and a power to make compensation for the loss occasioned by an unwarranted delay ought not to be overlooked."

The trustee in bankruptcy is a trustee for all the creditors. While it is his duty to object to proof of claims which are not lawfully allowable, he is not ordinarily justified in doing more than securing due and proper consideration of the questions presented and the determination of the bankruptcy court thereon. That determination affords the rule for both his guidance and protection, and establishes his duty to the creditors.

The general rule is that if a trustee goes further than this and contests the rights of his *cestuis que trustent*, after they have been judicially established by the court of which he is an officer, and contests, instead of obeying, the directions of that court, he does so at his peril.

POINT THIRD. The order or decree of the Circuit Court of Appeals should be affirmed or the appeal herein dismissed, with costs, and damages for delay.

WILLIAM G. WILSON,
Of Counsel.

Supreme Court of the United States.

No. 54.—October Term, 1906.

Martin Conboy, as Trustee in Bankruptcy of The Phillip Semmer Glass Company, Limited, Bankrupt, Appellant, *vs.* First National Bank of Jersey City. } Appeal from the United States Circuit Court of Appeals for Second Circuit.

[November 19, 1906.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This is an appeal from a final order of the Circuit Court of Appeals for the Second Circuit affirming an order of the District Court of the United States for the Southern District of New York, filed June 7, 1904, affirming an order of a referee in bankruptcy, "In the matter of Phillip Semmer Glass Company, Limited, Bankrupt," dated May 7, 1904, allowing the claim of the First National Bank of Jersey City against the bankrupt's estate.

The final order of the Circuit Court of Appeals was entered January 23, 1905. The trustee petitioned that court, April 25, to recall its mandate and vacate the order therefor, and the application was denied. On May 8 a petition for rehearing was filed, which was denied May 17, and an order to that effect entered May 24. A petition, dated the same day, was thereupon presented to a Justice of this court, praying an appeal "from the whole of the said order of affirmance of the Circuit Court of Appeals for the Second Circuit, dated the 23d day of January, 1905, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 25th day of April, 1905, denying the motion of your petitioner to recall the mandate of said court and cancel the order for same, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 24th day of May, 1905, denying the petition of the said trustee for a rehearing;" and for the reversal of "said orders and decrees, &c., and every part thereof."

Appeal was allowed and certificate granted under § 25*b*, par. 2, of the Bankruptcy Act, May 27, 1905. Thereafter and on June 14, 1905, findings of fact and conclusions of law were filed by the Circuit Court of Appeals, "*nunc pro tunc*, as though the same were made and filed at the time of entry of the judgment of this court on the 23d day of January, 1905."

The following provisions of the bankruptcy act are applicable:

"SEC. 25*b*. From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

* * * * * *

"2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

Paragraphs 2 and 3 of General Orders in Bankruptcy, XXXVI, read:

"2. Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a Justice of the Supreme Court of the United States.

"3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The law provides that appeals shall be taken "within such time as may be prescribed by the Supreme Court of the United States," and by General Order XXXVI this court prescribed the time and limited it to thirty days, in harmony with the policy of the bankruptcy act, requiring prompt action and the avoidance of delay.

The limitation has the same effect as if written in the statute, and the allowance of an appeal on certificate cannot operate as an adjudication that it is taken in time.

The present appeal was allowed four months "after the judgment or decree" appealed from and three months after the time to appeal had expired.

But it is said that the limitation should be referred to the date of the order denying the petition for rehearing, and the trustee prayed an appeal from that order as well as from the judgment of January 23.

No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Brockett* v. *Brockett*, 2 How. 238; *Wylie* v. *Coxe*, 14 How. 1. Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Credit Company, Limited*, v. *Arkansas Central Railway Company*, 128 U. S. 258, 261.

In the circumstances, the suggestion that there is but one term of the Circuit Court of Appeals for the Second Circuit, and that, by the rules of practice of that court, petitions for rehearing may be presented at any time during the term, and therefore that this petition operated to enlarge the limitation of the bankruptcy act, is without merit.

The petition was denied. Whether it could have been granted in view of the terms and spirit of the bankruptcy act, or the effect, if it had been, we are not called upon to discuss.

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court U. S.